

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No. 99-CV-2496 (GK)
)	
and)	
)	
TOBACCO-FREE KIDS ACTION FUND,)	
<i>et al.</i>)	
)	
Plaintiff-Intervenors)	
)	
v.)	
)	
PHILIP MORRIS USA, INC., <i>et al.</i> ,)	
)	
Defendants.)	
)	

PLAINTIFF-INTERVENORS' SUBMISSION
PURSUANT THE COURT'S ORDER #1025

Introduction

Pursuant to the Court's Final Judgment and Remedial Order (Order # 1015), on October 16, 2006 the Public Health Intervenors (Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers' Rights, and National African American Tobacco Prevention Network) submitted proposed corrective statements on the five issues identified by the Court. In that submission, the Public Health Intervenors also recommended that, in order to insure that the Court-Ordered corrective statements serve their intended purpose, the Court should not only determine the precise wording of the corrective statements, but should rely on an independent communications/advertising firm to determine the specific criteria governing the execution of each of the statements (*e.g.*, the print sizes and colors,

voices, use of graphics). As is standard in the industry, this firm would oversee basic market testing before making final recommendations to the Court.

In response to this and the United States' submissions, the Court has ordered the parties to address several issues. First, the Court has asked about the practical impact of taking these additional steps in connection with the corrective statements requirement. Second, the Court has inquired whether the statements should indicate that they are being issued pursuant to Court Order. Finally, the Court has asked whether it is appropriate for the Court to approve the details of the corrective statements, in addition to the specific wording of the statements. Order # 1025.

As explained below, the Public Health Intervenor believe it is entirely appropriate – indeed essential – for the corrective statements to indicate that they are issued by Court Order, as well as for the Court to approve the details of these statements. As regards the practical impact of determining these details, the Public-Health Intervenor recommend that the Court either permit the United States to oversee this task, as they have suggested, or alternatively, appoint a Rule 53 Special Master to do so. *See* Fed. R. Civ. P. 53. Either way, if adopting these steps for some media – such as the inserts – requires a relatively brief delay in the Court's deadlines, the Public Health Intervenor believe that the enormous benefits that would accrue from insuring truly effective corrective statements far outweighs any risks posed by such a minor delay. In any event, as also explained below, all the steps being recommended can be completed in approximately six to eight weeks, which would not significantly delay the date by which the public will finally be hearing the truth about the adverse health impacts of smoking, addictiveness, nicotine manipulation, "light" cigarettes, and secondhand smoke.

Discussion

1. The Practical Impact Of Plaintiffs' Proposals

Both the United States and the Public Health Intervenors have recommended that, before the corrective statements are finalized, the Court should utilize an independent communications firm to develop the most effective design characteristics for each of the media. The Court has asked the parties to explain the practical impact of such an approach.

The first question the Court must address is *who* will oversee the appointment of these experts and their work. As a threshold matter, the Public Health Intervenors have no objection to the United States' suggestion that they be authorized to be the managers of this project. *See* U.S. Notice of Compliance With Order # 1015, at 1. Under that approach, the Court would permit the United States to retain appropriate third party professionals to design and test the corrective statements based on the language selected by the Court and submit final products for the Court's approval.

Alternatively, the Public Health Intervenors suggest that this might be an appropriate role for a Special Master, who, under Rule 53, may be appointed to "address pretrial *and posttrial* matters that cannot be addressed effectively and timely by an available district judge" Fed. R. Civ. P. 53(a)(1)(C) (emphasis added); *e.g.*, In re Holocaust Victim Asset Litigation, 282 F.3d 103, 104-07 (2d Cir. 2002) (discussing appointment of Special Master to implement a court-approved settlement). Earlier in this litigation, the Court appointed Judge Richard A. Levie (Ret.) as a Special Master. *See* Dec. 22, 2000 Order (making appointment); Order # 909 (terminating appointment). In light of the more than 170 reports Judge Levie issued in that role, and his consequent

familiarity with these proceedings, if he is available Judge Levie would certainly be an appropriate Special Master for this specific post-trial matter. *See Cobell v. Norton*, 334 F.3d 1128, 1142 (D.C. Cir. 2003) (noting “the practice of a federal district court appointing a special master pursuant to Rule 53 to supervise *implementation of a court order . . .*”) (emphasis added); *Woodson v. Green*, 191 F. Supp. 2d 1231, 1233 (D. Kan. 2002) (Special Master appointed to monitor defendants’ compliance with consent judgment); *Johnson v. Bd. of Ed. Of Champaign Unit School Dist.*, 188 F. Supp. 2d 944, 985 (C.D. Ill. 2002) (same); *Rosen v. Tennessee Commr. of Fin. and Admin.*, 204 F. Supp. 2d 1061, 1095 (M.D. Tenn. 2001) (same).¹

Under either scenario, the Public Health Intervenors would recommend that the Court direct the United States (or the Special Master) to hire an independent communications/advertising firm that would take the specific language approved by the Court for each corrective statement and determine the relevant details governing the execution of each of the statements (*e.g.* the print sizes and colors, voices, use of graphics), after which the firm would make final recommendations for the Court’s approval.² The Court would then issue a final Order approving the final artwork to be used by Defendants in each the five media.

As regards the selection of language, for all the reasons detailed in the Public Health Intervenors earlier Memorandum, the Court should choose the specific language

¹ Although, in response to requests for Court Monitors to oversee certain proposed corporate structural changes, the Court determined that it would be inappropriate to delegate such broad powers, *see* Opinion at 1648-52, the limited role that a Special Master would be playing here – *i.e.*, overseeing implementation of the Court’s corrective statements requirement – raises none of those concerns. *Id.* at 1652 (“it is permissible for the court to appoint an individual to oversee and monitor implementation of a decree”).

² As the Public Health Intervenors have explained, it is imperative that the firm hired for this project not have tobacco companies as current or recent clients. *See* Plaintiff-Intervenors’ Corrective Statements Memorandum (“PHI Mem.”) at 43.

the Public Health Intervenor have proposed for each statement, including all three elements outlined – (a) the headline admission of Defendants’ prior deliberate misstatements; (b) the language indicating that the statement is being issued pursuant to a Court Order (*see Part 2, infra*); and (c) a listing of the most important accurate facts concerning each topic, presented in a succinct and simple manner. Of the proposed corrective statements submitted to the Court, the Public Health Intervenor believe – based on extensive experience in this kind of communication effort – that their proposed language will be the most effective at correcting the public’s and smokers’ misunderstandings on these topics.

The two other questions raised by this approach are the time and cost involved. To answer those questions, the Public Health Intervenor have consulted with two communications firms with whom they have worked in the past, and who have extensive experience in tobacco-education related advertising campaigns. Those firms have estimated that, once given the assignment, a firm could develop the final statements in six to eight weeks, two to three weeks of which would involve the market testing element. At the conclusion of the process the firm would produce, for the Court’s consideration and approval, the final artwork for each corrective statement in each medium, which the companies would use for placement.³

While this approach would not permit completion of the onsets by the November 9, 2006 date requested by Philip Morris, it would delay the completion date by only up to two months. While this would require the deadlines for the onsets to be extended, the

³ For the newspapers, onsets, countertop displays, and websites, the final product would be camera ready documents that would just need to be appropriately sized for the specific media (e.g. to accommodate the size of the specific newspaper). For the television advertisements, the final product could be final film that would just need to be put into the appropriate format.

Public Health Intervenor urge that the benefits in terms of insuring effective onsets – which will be directed primarily at smokers themselves (who buy the cigarette packs on which the onsets will appear) – far outweigh the downsides of such a brief delay. Thus, while the Public Health Intervenor agree that it is critical for the corrective statements to be issued as soon as possible, that urgency does not counsel against the additional steps recommended here.⁴

No similar concerns have been raised regarding the other media, and thus it appears that, even taking these steps, the deadlines for the other media may remain on or near the present timetable. These steps could certainly be completed in time to meet the February 2007 deadlines for the countertop displays and television advertisements. As for the newspaper advertisements, the first of which is due December 3, 2006, these steps might require moving the current schedule back for up to two periods. *See* Final Order at II.B.7.c (requiring advertisements to be run once every four weeks). Again, in the view of the Public Health Intervenor, such a brief delay would be well worth the benefits in terms of insuring that the corrective statements are as effective as possible.

Finally, in terms of cost, according to the several firms with whom the Public Health Intervenor have consulted, these steps (including the market testing) would cost at most, approximately \$675,000, and potentially much less in light of the various fees

⁴ Alternatively, in order to shorten the delay, the Court could forego the market testing, which would save two to three weeks. While basic market testing – which the Public Health Intervenor have assumed would involve 8-12 focus groups of 10-12 individuals, as well as an online survey of approximately 2,000 – would help to provide a final check on the corrective statements (*see, e.g.*, *Designing and Implementing an Effective Tobacco Counter-Marketing Campaign*, Chapter 3 ("Gaining and Using Target Audience Insights"), Centers for Disease Control and Prevention, U.S. Department of Health and Human Services Office on Smoking and Health (October 2003) (Accessed at http://www.cdc.gov/tobacco/mrc/counermarketing/pdf/Tobacco_CM_Manual.pdf); *see also* *Making Health Communications Programs Work*, Stage 2: Developing and Pretesting, National Cancer Institute, U.S. Department of Health and Human Services, at 83 (Accessed at <http://www.cancer.gov/pinkbook>)), in the Public Health Intervenor's view the Court could direct that the outside firm forego this step if the Court adopted the Public Health Intervenor's proposed language.

charged by different agencies that do this kind of work.⁵ Even assuming the higher cost estimate here, when divided among the six Defendants this would require an expenditure of *at most* less than \$115,000 each. Certainly, when compared to the Defendants' exponentially larger advertising budgets, this is a paltry sum indeed. *See, e.g., Op. at 997-99* (discussing *billions* of dollars spent on tobacco advertising).⁶

Moreover, if the Court were to simply dictate the language of the corrective statements, and then permit the Defendants to take these next steps on their own, they are likely to incur commensurate costs in any event, by either hiring their own communications firm, or paying staff to perform the work internally. Indeed, should Defendants each choose to take these steps independently, rather than pooling their efforts, it may be even more expensive than the approach Plaintiffs are proposing.

At the same time, Plaintiffs' approach will also be more effective, for at least two reasons. First, as noted, if Defendants are permitted to control the relevant details of these statements, those details are likely to *undermine* their effectiveness. *See PHI Mem. at 39-40* and Exhibit B (providing an example of an ineffective newspaper advertisement). Second, while, if permitted, Defendants are likely to create six *very different* designs, by having one independent firm design all of the corrective statements the Court will insure that consumers see the statements in one *consistent* design. In addition to the economic efficiencies of this approach, such statements will clearly be

⁵ This estimate does not include the cost of purchasing any of the media – *i.e.*, buying space in newspapers – which the Defendants will have to incur regardless of whether the Court adopts these proposals.

⁶ In this regard, it bears noting that a recent Center for Disease Control study concluded that, while smoking rates had been declining for eight straight years, that decline *stalled* in 2005, and suggested that “influencing factors may include” the fact that “tobacco-industry advertising and promotional expenditures . . . more than doubled from \$6.7 billion in 1998 to \$15.1 billion in 2003.” *See Tobacco Use Among Adults --- United States, 2005*, 55 MMWR Weekly 1145, 1146 (2005) (available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5542a1.htm>).

more effective from a communications standpoint. In short, relying on a single independent firm to create one set of statements for each of the Defendants to use (with the only difference being the company name) will insure the use of an effective design that is communicated consistently to the public.

In sum, while it would cause some delay in the Court's present deadlines, the steps the United States and the Public Health Intervenors are recommending are critical to insuring that these corrective statements are as effective as possible in counter-acting Defendants' decades-long, multi-billion dollar effort to misinform the public about each of the issues the corrective statements will address.

2. Whether The Statement Should Indicate They Are Issued Pursuant to Court Order.

As for the Court's second question, as the Public Health Intervenors have explained, it is critical that the corrective statements state that they are being provided pursuant to Court Order. *See* PHI Mem. at 26-27. This language is necessary both to insure the believability of the message, and to distinguish this advertising from Defendants' *independent* advertising, which the public should continue to view with skepticism. *Id.*

Several Defendants have also specifically suggested this language. *See* Lorillard Tobacco Company's Proposed Corrective Statements ("Lorillard Mem.") at 2-3 ("The following statement is made by Lorillard Tobacco Company pursuant to a Court Order . . ."); Certain Joint Defendants' Submission of Proposed Corrective Statements at 3-7 ("This message is furnished by [Defendants] pursuant to a Court Order . . ."). While the Public Health Intervenors do not agree with Defendants' argument that "[t]he first amendment *requires* that such attribution be included in any statement ordered by the

Court,” Lorillard Mem. at 3 (emphasis added), there is no disagreement on the result, and thus the corrective statements *should* indicate that they are being issued pursuant to Court Order.

3. Whether The Court Should Approve All Relevant Details Of The Corrective Statements.

As the original submissions of the United States and the Public Health Intervenors demonstrated, it is both necessary and appropriate for the Court to approve all the details of the corrective statements before directing Defendants to issue them in the five media. *See* PHI Mem. at 18-44. The proposed corrective statements the Defendants have submitted to the Court only further reinforce those points.

In particular, even a cursory review of those proposals reveals that, far from *correcting* the decades of misinformation the Defendants have disseminated about their products, their proposals would either have no effect at all, or worse, would sow additional confusion about tobacco and its negative effects. For example, Lorillard recommends that the Court-Ordered corrective statement on the adverse health effects of smoking list more than thirty diseases and conditions, including “increased absenteeism from work and increased use of medical care services.” Lor. Mem. at 3. Certainly, this statement would not be an effective corrective communication.

Similarly, British American Tobacco (“BATCo”) recommends that the statement on nicotine manipulation state that:

BATCo manipulates the design of its cigarette brands to ensure that every cigarette of a particular brand or style will deliver the amount of nicotine (within 0.1 mg.) advertised for that brand, according to the test for nicotine in cigarette smoke adopted by the International Standards Organization.

If anything, this statement will convey that BATCo's manipulation of nicotine is entirely lawful and legitimate, rather than correcting the company's prior misstatements concerning nicotine manipulation.

In light of the ineffectiveness of Defendants' proposed *language*, it is evident that if the Court were to permit Defendants to control the *other* relevant details of the corrective statements, those other elements will also be designed to minimize, rather than maximize, the effectiveness of the message the corrective statements are meant to convey. Accordingly, Defendants' proposed language further demonstrates that it is critical for the Court to approve all the relevant details of the corrective statements and thereby to prevent the Defendants from undermining their effectiveness.

It is also entirely appropriate for the Court to do so. As the Public Health Intervenors have noted, these are the kind of elements that the Federal Trade Commission dictated in a corrective statement approved by the D.C. Circuit. PHI Mem. at 37-39, citing Warner-Lambert Co. v. FTC, 562 F.2d 749, 763 (D.C. Cir. 1977) (dictating, *e.g.*, the details of television advertisements). Moreover, in light of this Court's overwhelming findings regarding Defendants' myriad legal violations and decades-long efforts to misinform the public about the topics of the corrective statements, the Court should not only dictate the *language* of those statements, but should take these additional steps to insure that the final corrective statements are as effective as possible in achieving their intended purpose.

CONCLUSION

For the foregoing reasons, the Public Health Intervenors urge the Court to not only identify the specific language of the corrective statements, but to take appropriate steps to insure that the relevant details of these corrective statement enhance, rather than detract from, their effectiveness.

Respectfully submitted,

/s/

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